

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Respondent,

-against-

OTTAVIO LAMANTIA,

Defendant-Appellant.
-----X

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

DOCKET NUMBER: 74-2012

APPELLANT'S BRIEF

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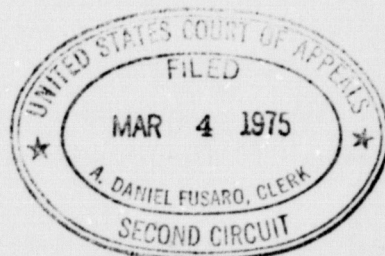


TABLE OF CONTENTS

Facts -----	1
Questions presented-----	3
Point One -----	3
Conclusion -----	9

TABLE OF CASES

Blackwell v. United States 244 F 2d 423,431 -----	8
California v. Green 399 U.S. 149 26 Led 2d 489 Page 8 -----	5
Cannady v. United States 351 F 2nd 796 -----	4
Chapman v. California 386 US 18, 87 Sct. 824 17 Led 2d 705 (1967) -----	7
Douglas v. Alabama 380 US 415 13 Led 2d 934-----	6
Dutton v. Evans 400 US 74 27 Led 213-----	5
United States v. Bishop 492 F 2d 1361 -----	7
United States v. Pucco 476 F 2d 1099 -----	6

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F A C T S

The defendant was tried before a jury and Hon. John R. Bartels commencing on February 14, 1974 and on February 22, 1974 when the jury was unable to reach a verdict and the Court declared a mistrial.

Trial was reconvened on April 23rd and 24th, 1974 before a jury and the same Judge and the defendant was convicted of one count of the indictment. The evidence against the defendant can be summarized as follows: That on November 13, 1973 a combined Task Force of Federal Narcotics Agents and New York City Police Department Agents met with a man by the name of Angelo Pinto who had negotiated with them for the sale of a quantity of narcotics. That Mr. Pinto took them to the vicinity of Second Place between Clinton and Henry Streets in the County of Kings at about 5:00 P.M. on that date. That a transfer of narcotics was contemplated and at about the time of the transfer the Agents arrested the defendant, LAMANTIA and Angelo Pinto. The two defendants were charged in a one count indictment with aiding and abetting each other in the sale or distribution of a quantity of narcotics. Angelo Pinto pleaded guilty to the one count count of the indictment and Ottavio Lamantia proceeded to trial alone.

During the course of the trial the Agents called by the Government were permitted to testify to conversations between the Agents and

Angelo Pinto, although Angelo Pinto was not a defendant in the action, was not called to the witness stand and had not been charged in any indictment with a conspiracy. All of the statements made by Mr. Pinto were allowed in over objection and were substantially inculpatory as regard to the defendant, LAMANTIA. The Agents further testified to a confession taken from the defendant at the scene after he had been placed under arrest under circumstances in which reasonable force had to be used to secure him. The remainder of the prosecution's case was wholly circumstantial in that no one saw the defendant, LAMANTIA, do or say anything in connection with the Narcotic transaction.

Q U E S T I O N S P R E S E N T E D

Were the Statements of the co-defendant not present at the trial admissible in evidence where there was no count or allegation of conspiracy?

P O I N T O N E

THE STATEMENTS OF ANGELO PINTO SHOULD NOT HAVE BEEN
ALLOWED IN EVIDENCE DURING THE TRIAL OF THIS DEFENDANT

The indictment charges that Angelo Pinto aided and abetted by Ottavio Lamantia knowingly and intentionally possessed with the intent to distribute a certain amount of a schedule 2 narcotic drug. These defendants were indicted in a one count indictment charging each with aiding and abetting the other but neither of them was charged with a conspiracy. At the trial of Ottavio Lamantia, Angelo Pinto did not appear for trial as he had already accepted and entered a plea of guilty to the charges. Statements made by him to Agents not in the presence of Ottavio Lamantia were permitted in evidence over objection and they prejudiced the trial of Lamantia. All of the statements made by Pinto were not subject to cross-examination and Mr. Lamantia did not have the opportunity to confront the major witness against him. The nature of the statements allowed in evidence and the substance thereof were that Mr. Pinto was taking the Federal Agents to his source or his friend or the place where the Narcotics were being stored. The jury in a case in which the government relied upon circumstantial evidence should not have heard these hearsay remarks and the conviction should not be allowed to stand.

In McCormicks Handbook of Evidence, Second Edition (1972) at page 584 the following definition of hearsay appears:

"Hearsay evidence is testimony in Court

... of a statement made out of Court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out of court asserter."

In the case before the Court the statements of Angelo Pinto were offered through the testimony of the various Prosecution witnesses and were offered to prove that Angelo Pinto was taken the Officers to Ottavio Lamantia as his supplier or as his source of the narcotics. This type of hearsay permits the jury to draw the inference that the defendant participated in the crime while the defendant is deprived of the opportunity of cross-examining the key witness against him. Angelo Pinto did not appear at the trial and did not testify although available to the government. In Cannady v. United States 351 F 2nd 796 the Court was faced with a problem similar in nature to the case at bar. In that case, statements of a companion of the defendant at the time of his arrest were introduced in evidence although that individual was not called to the witness stand. The purpose was to undermine the credibility of the defendant and his alibi defense. The friend (Fields) never having been called to the stand was not subject to cross-examination and his testimony was allowed into the case as though he had been called as a witness. The Court at page 798 stated:

"As the case was given to the jury the reports of Fields out of court statement could be given the same weight as sworn testimony by Fields. This clearly was improper. The purpose of the hearsay rule is to prohibit the use of such unsworn, uncross-examined testimony as substantive evidence in a case. ... the fact that such testimony serves an impeaching function independent of the truth of the unsworn statement testified to does not justify its use where the content of the statement is highly prejudicial."

The statements of Angelo Pinto were of such nature as not only highly prejudicial but offered with the intention of showing that the defendant, Lamantia,

alone on trial was the source of the narcotics. The statement was offered for the truth and to prove the connection between two men, only one of whom appeared for trial. The statement was, of course, the unsworn statement of Angelo Pinto and, in addition thereto, was not subjected to cross-examination.

Most recently, in California v. Green 399 U.S. 149 26 Led 2d 489 at Page 158 the Supreme Court stated:

"Viewed historically, then, there is good reason to conclude that the confrontation clause is not violated by admitting the declaration out of court statements as long as the declarant is testifying as a witness and subject to full and effective cross-examination.

This conclusion is supported by comparing the purposes of confrontation with alleged dangers in admitting an out of court statement. Confrontation 1. Insures that the witness will give his statement under oath thus impressing him with seriousness of the matter in guarding against a lie by the possibility of a penalty of perjury.
2. Forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth";
3. Permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement thus aiding the jury in assessing his credibility."

It naturally follows, therefore, that if Angelo Pinto had taken the stand, any statement he made would be elicited from him and the question of whether or not he, in fact, made it could have been established. The defendant was deprived of this opportunity by the Government's choice of calling Agents to elicit hearsay information from them.

The Supreme Court has uniformly held that the Sixth Amendment Right of an Accused to confront the witnesses against him is a fundamental right and one which is enforceable upon the states (see Pointa v. Texas 380 US 400, Douglas v. Alabama 380 US 415, California v. Green 399 US 149).

In Dutton v. Evans 400 US 74 27 Led 2nd 213 an admission by a co-conspirator to a third party was admitted in evidence through the

testimony of a third party against the defendant in a murder trial. The State of Georgia had a statute permitting statements of co-conspirators to be introduced in evidence against their accomplices. The Supreme Court found that the Georgia statute permitting a co-conspirator's out of court statement to be admitted as an exception to the hearsay rule did not violate the rights of the defendant on trial. The most important ramification of this is that the defendant, Lamantia was not a co-conspirator as charged in the indictment and the statement of Angelo Pinto should not have been permitted in evidence.

Even a recent decision by this Court in United States v. Pucco 476 F 2d 1099 is compelling reason why the statements of Angelo Pinto should have been excluded at the trial of Ottavio Lamantia. The Court was faced with a challenge to the exception to the hearsay rule for an extra judicial declaration of a defendant's alleged co-conspirator. The Court found that the Agent who testified as to a hearsay declaration by a co-conspirator was admitted because the statement was made in furtherance of the conspiracy. Defendant, Lamantia certainly should not be denied his right to be tried under the indictment brought by the Government. The Government procured the indictment and charged him with aiding and abetting Angelo Pinto but not with having conspired with Angelo Pinto. The cases cited including Pucco allow out of court statements which would normally be hearsay to be admitted in evidence but only where the defendant was a co-conspirator. In the case at bar since Pinto was not a co-conspirator he should have been produced by the Government so that the defendant would have his opportunity to cross-examine and so that Pinto would have the opportunity to either accept the statements as made by the Government witnesses or deny having made those statements.

In Douglas v. Alabama 380 U.S. 415 13 Led 2d 934 the Court had before it a trial of one individual charged with assault with intent to

murder and during the course of his trial a co-defendant, who had already been tried and convicted was called to the stand. The co-defendant refused to testify and then the prosecutor read a statement to him that he had made implicating the defendant on trial. The purpose of reading the statement was to refresh his recollection but gave to the jury the entire text of the statement as he had given it to the Police. The Court found that this was a violation of the defendant's Constitutional Right to confront the witness against him. The Court found that the defendant had been denied his Constitutional Rights and stated at page 937:

"Although the solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd, in fact, made the statement;"

The Court went on to find that the reading of the statement was a very strong link between the commission of the crime and the defendant on trial and that, therefore, the fundamental error committed was sufficient to require a reversal. The case at bar is not so different from that in *Douglas v. Alabama* that the same type of a rule should not be applied. The statements of Pinto linked the defendant to the commission of the crime and the only other evidence of the commission of the crime is a confession made after force was used to subdue the defendant. A substantial question of fact for the jury would have been presented had not the hearsay testimony of Pinto been allowed.

In United States v. Bishop 492 F 2d 1361 the Court set forth the basic requirements in determining whether or not alleged error is harmless or not. The Court stated at Page 1365:

"In order for error to be declared harmless the reviewing Court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Chapman v. California* 386 US 18, 87 Sct. 824, 17 Led 2d 705 (1967). In *Holman v. United*

States 279 F 2d 767, 771 (see A-8 1960), we stated: "The reviewing court must, of course, be able to say with fair assurance that the errors complained of could not, with natural operation in the total setting and proceedings had, be regarded as having possessed any influencing effect. Blackwell v. United States 244 F 2d 423, 431 (see A-8 1957)."

The totality of the testimony against the defendant was the confession which a jury could have reasonably found to have been the product of the force used to subdue the defendant and the fact that he had no prior record and no prior involvement with any Police Agency. In addition thereto, the connecting and most vital link in the testimony against the defendant were the hearsay statements of Angelo Pinto. For this reason the defendant was denied his Constitutional Right to a fair trial and was denied in effect his right to confront the major witness against him.

C O N C L U S I O N

The Defendant's conviction should be reversed and a new trial ordered.

